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*Published in:*  
European Journal of Social Security

*DOI:*  
[10.1177/1388262720940328](https://doi.org/10.1177/1388262720940328)

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*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2020

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Gantchev, V. (2020). Welfare Sanctions and the Right to a Subsistence Minimum: a troubled marriage. *European Journal of Social Security*, 22(3), 257-272. <https://doi.org/10.1177/1388262720940328>

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# Welfare sanctions and the right to a subsistence minimum: A troubled marriage

European Journal of Social Security

2020, Vol. 22(3) 257–272

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DOI: 10.1177/1388262720940328

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## Abstract

Can welfare sanctions and the right to a subsistence minimum coexist? The present article sheds light on this question by examining recent developments in German social assistance law and placing them in the broader international legal context. In November 2019, the German Constitutional Court declared a large portion of the applicable regime unconstitutional because it violated the basic right to a guaranteed subsistence minimum. The first part of the article examines this German basic right and the way its normative requirements are applied by the Constitutional Court to welfare sanctions. Two important points of reference which are discussed relate to the effectiveness of the measures and the availability of sanction mitigation instruments that safeguard the constitutionally guaranteed subsistence minimum. The second part of the article carries out a similar examination into the international human right to social assistance and the respective case law of the international supervisory bodies. A comparative legal analysis is carried out in the third part, which highlights the similarities between the German and the international legal approach to minimum social protection and welfare sanctions. The article concludes with the observation that welfare sanctions and the right to a subsistence minimum can only coexist under the condition that states respect the absolute nature of minimum social protection and reconcile the adopted measures with the primary objective of social assistance: reintegration and social inclusion.

## Keywords

Welfare sanctions, right to social assistance, subsistence minimum, German Constitutional Court, BVerfG, ESC, ICESCR

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## 1. Introduction

In the present day, sanctions have become an indispensable instrument in the toolkit of the modern welfare state. They lie at the core of the current approach to welfare conditionality which promotes compliance with benefit conditions through the use of negative incentives: recipients who fail to 'hold their end of the bargain' are sanctioned by stopping their benefits. Since the 1990s, the inflation of welfare conditionality has gone hand in hand with a notable expansion in the scope, severity and incidence of benefit sanctions.<sup>1</sup> In this landscape, the overwhelming majority<sup>2</sup> of European welfare states have embraced the 100% benefit reduction sanction – a complete suspension of welfare payments, like the sword of Damocles hanging above the heads of recipients of social assistance. Citizens who (repeatedly) fail to comply with the increasingly rigid and difficult-to-navigate rules of welfare conditionality can be denied nearly any form of social protection. The situation of these individuals is aggravated by the duration of the sanctions, which can range somewhere between several months (in Germany and the Netherlands) and an astonishing 36 months (in the United Kingdom).

At the same time, the potentially devastating effect of welfare sanctions on vulnerable groups of individuals is increasingly being criticised. In his recent book *Cruel, Inhuman or Degrading treatment? Benefit Sanctions in the UK*, Adler asks why benefit sanctions are not a matter of greater public concern, considering they are 'so ineffective and cause so much suffering'.<sup>3</sup> The human suffering resulting from welfare sanctions was also the subject of Ken Loach's 2016 film *I, Daniel Blake* which emotionally touched viewers across European movie theatres. The film portrayed the mental struggles benefit recipients must undergo when confronted with the rigid system of rules and sanctions, and it culminated with the death of the main character who suffered a heart attack. Unfortunately, such tragic events are not limited to the world of fictional movie characters. The most extensive empirical research on the impact of welfare conditionality available has concluded that welfare sanctions can 'exacerbate[e] existing physical and mental illnesses and [trigger] high levels of stress, anxiety and depression' and, in a limited number of cases, provide a fertile ground for suicidal thoughts.<sup>4</sup> The negative impact of sanctions on the well-being of benefit recipients is amplified by the ineffectiveness of these measures. Academic research concludes that while benefit sanctions get claimants off benefits, they do not necessarily get them into paid work. On the contrary, sanctions are proven to have a generally unfavourable impact on the longer-term employment perspectives of individuals and furthermore cause spill-over effects by pushing benefits recipients into homelessness or turning them into drug dealers.<sup>5</sup>

From a legal perspective, far-reaching benefit reductions have a strained relationship with the right to a subsistence minimum which obliges states to provide minimum levels of assistance to all vulnerable persons in need. This strained relationship has been subject of relatively little academic research.<sup>6</sup> The present article contributes to the existing body of knowledge by looking at welfare

1. Dwyer and Wright (2014); Vonk (2014); Eleveld (2016); Adler (2018), pp. 45-61; Eichenhofer (2015).

2. The following countries have adopted sanctions of 100% benefit reduction: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Germany, Italy, Lithuania, Luxembourg, Netherlands, Spain, Poland, Portugal, Romania, Slovenia, Slovakia, and the United Kingdom; cf. Eleveld (2018), pp 463 et seq.

3. Adler (2018), p 9.

4. WelCond and Dwyer (2018), p 7; WelCond (2018), pp 19 et seq.

5. Griggs and Evans (2010); WelCond (2018), pp 18-19; Adler (2018), pp 73-86.

6. Notable exceptions here are Eleveld (2018); Eleveld (2016); for the German academic literature on this matter cf. note 19.

sanctions in the light of recent judicial developments. It departs from the November 2019 judgment of the German Constitutional Court which declared a large portion of the applicable regime unconstitutional because it violated the basic right to a guaranteed subsistence minimum.<sup>7</sup> The first part of the article examines this German basic right and the application of its normative requirements by the Constitutional Court to welfare sanctions. Two important points of reference are discussed which relate to the effectiveness of the measures and the availability of sanction mitigation instruments that safeguard the constitutionally guaranteed subsistence minimum. The second part of the article carries out an examination into the international human right to social assistance and the respective case law by the international supervisory bodies. A comparative legal analysis is carried out in the third part which highlights the similarities between the German and the international legal approach to welfare sanctions. The article concludes with the observation that welfare sanctions and the right to a subsistence minimum can only coexist under the condition that states respect the absolute nature of minimum social protection and reconcile the adopted measures with the primary objective of social assistance: reintegration and social inclusion.

## 2. Welfare sanctions in the German legal context

### a). *The German basic right to a guaranteed subsistence minimum*

i) *Historical development and legal framework.* It may come as a surprise that the German Basic Law of 1949 (*Grundgesetz* (GG)) was unfamiliar with the concept of social assistance as a human right. The constitutional legislator refrained from including a respective provision in the catalogue of protected basic rights (Articles 1-19 GG). Instead, the constitution which was designed to govern the post-war legal order adopted in Article 20(1) GG a general declarative provision which proclaims Germany as a social state. The provision assumes the responsibility of the German state to set up the social arrangements necessary in a social state. This was the initial conception of social assistance in Germany: a task to be fulfilled by the state where politics have the primacy. This stance is clearly reflected in one of the early decisions of the BVerfG from 1951 in which the Court reached the conclusion that neither the protection of human dignity (Article 1(1) GG) nor the protection of physical integrity (Article 2(2) GG) conferred upon individuals a basic right to adequate social protection by the state.<sup>8</sup> This, however, did not mean that citizens were left behind without any form of protection. The social state principle of Article 20(1) GG obliged the state to adopt the social protection arrangements necessary in a social state. In extreme cases of arbitrary shortcomings of the legislature, the Court did not exclude the possibility that individuals could turn to the judiciary by means of a constitutional complaint.<sup>9</sup>

Two decades later, in the 1970s, the German Constitutional Court paved the way for a rights-based approach to social assistance by accepting the existence of an unwritten basic right to a guaranteed subsistence minimum.<sup>10</sup> The constitutional anchor for this basic right was found in the protection of the inviolable human dignity (Article 1(1) GG) in conjunction with the social state

7. BVerfG 1 BvL 7/16 (05.11.2019), cf. case note Gantchev (2019).

8. BVerfGE 1, 97 (19.12.1951).

9. Idem; cf. Mayen (2012), pp 1453-1454; Banafsche (2016), pp 231-232.

10. BVerfGE 40, 121 (18.06.1975); BVerfGE 45, 187 (21.06.1977). In a comparable development, the Swiss Federal Supreme Court recognised in 1995 an unwritten basic right to a secure existence. In 1999, however, this right was included in the revised Swiss Constitution; cf. Studer and Pärli (2020).

principle (Article 20(1) GG) which, according to the Court, demand that the state guarantee to every individual the means necessary for covering the subsistence minimum. The birth of this basic right, however, did not immediately enhance the legal position of welfare recipients; individuals could still not rely on it in court proceedings as a legal basis supporting their social assistance claims. The Court held on to its view that it is primarily the task of the legislator to translate the requirements of this abstract right into practice by enacting respective legislation, and that this right can be invoked before courts only in very extreme cases of legislative idleness.<sup>11</sup>

In 2010, the Constitutional Court handed down a landmark judgment which recognised for the first time the direct and subjective nature of the right to a guaranteed subsistence minimum.<sup>12</sup> From that point on, this right has been regarded as justiciable, meaning that it can be directly invoked before national courts, albeit with one important caveat: individuals cannot base their actual benefits claims on this right, but instead use it as a weapon to address legislative shortcomings. In German academic literature, it is referred to as a *right to a right*.<sup>13</sup> This well-thought approach of the Constitutional Court addresses the relationship between government-run social policy and basic rights in a subtle and constitutionally elegant manner. It highlights the primary task of the legislator who remains responsible for adopting the social security arrangements necessary in a social state. At the same time, however, the constitutional status of the right to a guaranteed subsistence minimum effectively restricts the margin of appreciation of the national Parliament in cases where mandatory minimum standards are neglected. Acts of Parliament that fail to comply with the normative requirements can be challenged directly by individuals or by referring national courts of justice which can trigger constitutional examination by the BVerfG. If the Constitutional Court finds that the challenged Acts of Parliament do not meet the normative requirements, they can be declared unconstitutional. As a legal consequence, the disputed provisions can be rendered inapplicable, and the Court can oblige the legislator to adopt new legislation which remedies the shortcomings. In some cases, the BVerfG may also adopt transitional provisions which apply until the improved legislation has entered into force.

In the past decade, the constitutional embedment of the right to a guaranteed subsistence minimum has proven to be an effective instrument for steering deficient social policy and legislation in the right direction. In the above-mentioned 2010 judgment, the BVerfG found that the legislator did not determine the abstract needs necessary for calculating the amount of welfare benefits paid (the so-called *Regelsatz*) in a statistically coherent manner, and requested that the national Parliament adopt new legislation.<sup>14</sup> In another remarkable case of 2012, the Court reached the conclusion that the amount of assistance paid to asylum seekers was 'obviously insufficient' to cover the guaranteed minimum subsistence costs, also considering that the level of benefits had not been adjusted since 1993.<sup>15</sup> Until a remedy had been adopted by the legislator, the Court declared respective provisions from the general social assistance regime (*Sozialhilfe*) for applicable. A final example to be mentioned here concerns the 2019 judgment in which the BVerfG found a large portion of the welfare sanctions regime to be unconstitutional, which it replaced with transitional regulation.<sup>16</sup> The three cases mentioned highlight the delicate manoeuvres undertaken by the Court

11. Cf. Mayen (2012), pp 1453-1454; Banafsche (2016), p 232.

12. BVerfGE 125, 175 (09.02.2010); for an analysis of this judgment (in German) cf. Rixen (2010); Mayen (2012).

13. Mayen (2012), pp 1460-1461; cf. Droschel (2014), p 98; Vonk and Olivier (2019), p 230.

14. BVerfGE 125, 175 (09.02.2010).

15. BVerfGE 132, 134 (20.06.2012).

16. BVerfG 1 BvL 7/16 (05.11.2019).

in order to substantiate the fragile balance between policy-driven legislation and rights-driven minimum standards of social protection.

*ii) Normative requirements.* The basic right to a guaranteed subsistence minimum creates a set of obligations of the state to support all individuals who do not dispose of the required means to cover their subsistence costs. These obligations delineate the *minimum level* of public assistance which must be granted to all persons in a social state. In this light, the right to a guaranteed subsistence minimum cannot be equated to a more general right to social assistance, as it is known at in international legal order. The question of which arrangements are necessary in order to deliver *adequate levels* of public support is governed by the social state principle of Article 20(1) GG which has a programmatic character. Without digging deeper into this dichotomy, it can be argued that the basic right to a guaranteed subsistence minimum forms a subset of core obligations of the state which arise in the context of the social state principle.

The minimum protection character of the right to a guaranteed subsistence minimum influences the scope of protection which is both wide and narrow. Having its constitutional anchor in the protection of human dignity, this basic right has a very broad personal scope of application which extends to every natural person. After all, the protection of human dignity has the status of a universal, inviolable human right that can be enjoyed by all. This broad personal scope was demonstrated in the 2012 judgment of the BVerfG where the Court applied the normative criteria of the right to the situation of asylum seekers.<sup>17</sup> At the same time, however, the material scope of protection is very narrow: only the subsistence minimum is covered. According to the definition applied by the German Constitutional Court, the subsistence minimum has two dimensions which must be satisfied.<sup>18</sup> The first one relates to the physical existence of the individual and covers the means necessary for food, clothing, accommodation, heating, hygiene and health. The second dimension is of socio-cultural nature and aims at establishing a basic level of participation in social, cultural and political life. In the eyes of the BVerfG, these two dimensions must be secured in an integral manner: the government cannot neglect the socio-cultural dimension by invoking the argument that it has provided the means necessary for physical survival.<sup>19</sup>

## ***b) Proportionality of welfare sanctions***

*i). Introduction to the 2019 BVerfG case.* The relationship between welfare sanctions and the basic right to a guaranteed subsistence minimum has been a long-disputed matter in German academic literature.<sup>20</sup> Despite the numerous academic contributions on this topic, there was no legal certainty regarding the constitutionality of welfare sanctions up until the 2019 judgment of the Constitutional Court.<sup>21</sup> The factual circumstances which gave rise to the case concern the reduction of the welfare benefits of an unemployed individual as a sanction for his repeated refusal to accept suitable employment.<sup>22</sup> The contested provisions for sanctioning non-compliance in the

17. BVerfGE 132, 134 (20.06.2012).

18. BVerfG 1 BvL 7/16 (05.11.2019), sec 119.

19. Idem.

20. Cf. Neškovic and Erdem (2012); Drohsel (2014); Berlit (2013); Merold (2016); Burkiczak (2012); Neškovic and Erdem (2012a).

21. BVerfG 1 BvL 7/16 (05.11.2019); cf. case note Gantchev (2019).

22. For a thorough examination of the facts of the case cf. Gantchev (2019).

German social assistance scheme known as *Hartz IV* are laid down in § 31a(1) and §§ 31b *Sozialgesetzbuch II* (SGB II). According to § 31a(1) SGB II, every breach of claimant duties must be punished with a benefits reduction of 30% for first offenders and 60% or 100% in cases of recidivism.<sup>23</sup> These sanctions have a mandatory character, meaning that the welfare administration is legally obliged to always punish non-compliance by reducing benefit payments. Article § 31b(1) SGB II pinpoints the duration of all sanctions at three months. Under this challenged legislation, the only possibility to mitigate the negative effect of the imposed sanctions is created by Article §31a(3) SGB II which regulates the provision of alternative forms of assistance. According to this legal norm, the welfare administration *can* provide alternative forms of assistance such as benefits in kind in the case of a 30% reduction, and *must* cover the expenses for accommodation and heating when benefits are reduced by 60% or more.

In its 2019 judgment, the BVerfG approached the constitutionality of welfare sanctions by examining whether the sanctioning regime is in accordance with the requirements of the basic right to a guaranteed subsistence minimum. The tool applied by the Court is the well-known proportionality test which is used to justify limitations of basic rights. In the context of the proportionality test, the Court examined whether the contested measures are suitable, necessary and proportionate in the strict sense for attaining a legitimate goal in the public interest.<sup>24</sup> The most important findings are summarised in the following subchapters.

*ii). General observations on welfare conditionality and sanctions.* The BVerfG began its constitutional review of the contested measures with some general observations about the relationship between welfare sanctions and the basic right to a guaranteed subsistence minimum.<sup>25</sup> The protection of the inviolable human dignity, which is at the core of the state obligation to realise the required minimum levels of social protection, is a universal right that can be enjoyed by all individuals regardless of the question whether they display a ‘dignified’ behaviour.<sup>26</sup> Accordingly, the right to protection of human dignity must not be earned, instead it should be respected by the state regardless of the personal characteristics or social status of a given individual. In other words, the ability of an individual to secure his or her own subsistence is not a prerequisite for the protection of human dignity by the state.

At the same time, however, the wide legislative margin of appreciation in social matters allows the legislator to tie the provision of welfare benefits to the so-called subsidiarity principle, according to which assistance must be granted only in cases where there is a real existing need.<sup>27</sup> The subsidiarity principle enables the state to attach conditions to the provision of social assistance which are directed at increasing the capacity of individuals to overcome the situation of need by themselves. Accordingly, claimant conditions which pursue the aim of social reintegration are not incompatible with the right to a guaranteed subsistence minimum – on the contrary, they may help the realisation of this basic right. In this light, the Constitutional Court drew an important line between reintegrative measures and measures which aim at ‘improving’ the personality of welfare claimants without bringing them any closer to the labour market. The latter are incompatible with

23. § 31a(1) SGB II establishes a stricter sanctioning regime for claimants who have not reached the age of 25.

24. Cf. on the application of the proportionality test on welfare sanctions: Drohsel (2014), pp 100-103; Merold (2016).

25. BVerfG 1 BvL 7/16 (05.11.2019), sec 117-135.

26. BVerfG 1 BvL 7/16 (05.11.2019), sec 120; cf. on the human dignity as dogmatic justification of the basic right to a guaranteed subsistence minimum: Wallerath (2008); Drohsel (2014), pp 98-100.

27. BVerfG 1 BvL 7/16 (05.11.2019), sec 124-128.



the German Basic Law because, as the BVerfG put it, ‘there is no moral high ground of the state in relation to benefits recipients’ which justifies the adoption of such ‘paternalistic’ measures.<sup>28</sup>

Moreover, the Court held that the legislator may use its margin of appreciation to pursue compliance with benefits conditions by adopting negative incentives such as welfare sanctions.<sup>29</sup> An important condition is that the state cannot use these measures for purely punitive purposes – they must be effective in their primary objective which is to promote the fulfilment of claimant duties and thereby to contribute to the reintegration of vulnerable individuals. With regard to the reduction of benefits in particular, the BVerfG called for the necessary caution. The (partial) suspension of welfare payments can deprive the concerned individuals of their constitutionally guaranteed minimum subsistence means. Against the background of the personal hardship these measures may cause, the Court decided to narrow down the wide margin of appreciation of the legislator and to subject more severe welfare sanctions to a stricter proportionality test.<sup>30</sup> Accordingly, the BVerfG carried out a thorough constitutional examination which looked into the question of whether the applicable sanctioning regime was suitable for attaining the goal of reintegration, and whether less onerous measures were not available. Eventually, the Court reached the conclusion that the applicable sanctioning regime failed the proportionality test because it displayed two important deficiencies: its effectiveness had never been proven, and did not incorporate sufficient sanction mitigation instruments.

*iii). The effectiveness of welfare sanctions.* In its 2019 judgment, the Constitutional Court paid special attention to the effectiveness of welfare sanctions.<sup>31</sup> The BVerfG expressed its concern that despite the legal duty of the state to examine the effects of the provision of social assistance benefits on a regular basis,<sup>32</sup> there had been no comprehensive examination of the effects of the German welfare conditionality regime in §§ 31, 31a, 31b SGB II. The Court referred to a handful of German empirical studies on the effectiveness of sanctions which it dismissed as inconsistent with respect to their methods, how representative they are, and their results. The judges concluded that there was no empirical evidence that the threat of sanctions had a positive effect on promoting compliance with claimant duties. On the contrary, some studies pointed towards the conclusion that sanctions may be counter-productive for the social reintegration of unemployed individuals and highlighted the dangers of pushing vulnerable people into isolation, exclusion, destitution, homelessness or survival crime and further distancing them from the services of the welfare administration.<sup>33</sup>

The doubts on the effectiveness of welfare sanctions influenced the application of the proportionality test in the case at hand. In the first step of the test, the BVerfG examined whether the measures are suitable for attaining the desired goal of promoting compliance with claimant duties. Generally speaking, the wide margin of appreciation of the national Parliament allows it to assess the factual circumstances and to choose the means for achieving the goal of the legislation. In the present case, however, the BVerfG found that this margin of appreciation must be reduced due to the impact of the contested measures on the constitutionally guaranteed minimum and due to the

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28. Ibid, sec 127.

29. Ibid, sec 129-135.

30. Idem.

31. BVerfG 1 BvL 7/16 (05.11.2019), sec 55-67.

32. Cf. § 55(2) SGB II.

33. BVerfG 1 BvL 7/16 (05.11.2019), sec 65.



fact that the legislator had had more than sufficient time to carry out reliable empirical research on the effects of the welfare sanctions since their adoption.<sup>34</sup> The Court examined the three levels of sanctions separately, being more lenient in its review of the 30% benefit reduction and becoming increasingly rigorous when examining the 60% and 100% sanctions.<sup>35</sup> In the context of the 30% benefit reduction, the Court accepted the suitability of this measure based on the assumption of its effectiveness with the argument that the negative impact on basic rights remains, here, within limits. The outcome, however, was a different one in the case of the 60% and 100% sanctions. In the eyes of the Court, a reduction of this extent evidently deprives individuals of their subsistence means, especially considering the very low level of benefits under *Hartz IV* which, as the Court noted, are 'barely sufficient' to cover the constitutionally guaranteed minimum in the first place.<sup>36</sup> Taking into account the devastating effects such severe sanctions can have on vulnerable groups of individuals, the BVerfG found that the legislator can no longer rely on plausible assumptions that these measures are effective. Instead, the effectiveness of the 60% and the 100% sanctions must be proven by sufficiently reliable empirical studies. Having failed the proportionality test, the Court declared the 60% and 100% benefit reductions unconstitutional and conferred on the legislator the duty to adopt new legislation to replace them. In the meantime, the German welfare administration is no longer allowed to punish (repeated) non-compliance by reducing benefit levels by more than 30%.

*iv). Sanction mitigation instruments.* Another important point of concern raised by the Constitutional Court addressed the rigid nature of the German sanctioning system. Under the applicable rules, every non-compliance with claimant conditions must be punished by a benefits reduction which has a duration of three months. The contested legislation does not leave any margin of appreciation for the welfare administration to refrain from imposing a sanction in an individual case, where this would be counterproductive for the reintegration of the benefits claimant. The BVerfG pointed out that this rigidity gave rise to an inconsistent sanctioning practice.<sup>37</sup> The Court referred to comprehensive studies which suggest that the most important factor behind the question of whether a sanction is imposed is the particular regional institution which is handling the claim. According to these studies, the sanctioning rate varied across the various social administration institutions with regards to the age, qualification, sex and living situation of the claimant, as well as the labour market conditions. In many cases, the welfare administration is reported to award itself legally non-existent discretion by not imposing mandatory sanctions in cases where they are expected to have the counter-productive effect of increasing individual hardship.<sup>38</sup>

According to the BVerfG, the mandatory nature of the sanctioning regime prevented the welfare administration from refraining from imposing a sanction in cases where this would be counter-productive for the reintegration of the individual.<sup>39</sup> In the eyes of the Court, case workers should be able to decide against imposing a sanction when the circumstances of the case demand this. The Court pointed out that reducing the benefits of people with psychological problems or individuals who are hardly employable is ineffective and contrary to the aim of reintegration. Accordingly, the

34. Ibid, sec 134.

35. Cf. 30% sanction: Ibid, sec 158-188; 60% sanction: Ibid, sec 189-200; 100% sanction: Ibid, sec 201-209.

36. Ibid, sec 190.

37. Ibid, sec 58.

38. Ibid, sec 67.

39. Ibid, sec 176, 181, 184-185, 207.

Court found that the mandatory nature of the sanctions in § 31(1) SGB II failed every step of the proportionality test. The legislator had several possible courses of action: it could adopt discretionary clauses allowing the administration to refrain from imposing sanctions that would obviously be ineffective, or introduce a hardship clause which spared the sanction in individual cases to avoid personal hardship.<sup>40</sup> Until the legislator has remedied the unconstitutionality of the provision, the Court announced that § 31(1) must be interpreted in a way that includes both a discretionary clause and a hardship clause.

Finally, the BVerfG addressed the fixed duration of the benefit sanctions which is set at three months.<sup>41</sup> Once again, the judges found the legislative framework to be insufficiently flexible to cater to the needs of individual cases. It created no incentives for sanctioned individuals to alter their behaviour and become compliant before the sanction was lifted. Instead of promoting compliance with claimant duties, lengthy sanctions can create disincentives and even cause unemployed individuals to terminate their contact with the welfare state. Against this background, the Court did not accept that the fixed duration of three months is suitable or necessary for achieving the aim of the sanction. The constitutional requirements allow the state to withhold the provision of the guaranteed minimum only when and insofar unemployed individuals do not comply with their duty to cooperate. The Court declared that the duration of sanctions was unconstitutional and decided to inject a reparation clause into the respective provision. Under this clause, the welfare administration can suspend the effect of the sanction before the three months have lapsed in cases where sanctioned individuals have declared that they are ‘seriously and sustainably’ willing to fulfil their claimant duties.

### 3. Welfare sanctions in international legal context

#### *a. The international human right to social assistance*

*i). Historical development and legal framework.* While the German Constitution does not recognise a basic right to social assistance as such, this right is well established in the international legal order. The right to social assistance belongs to the cluster of international social rights which emerged in the aftermath of WWII. The recognition of social human rights marked an important turning point at which poverty relief shifted from a charitable act to a state obligation. As the European Committee of Social Rights (ECSR) puts it, states ‘are not merely empowered to grant assistance as they think fit; they are under an obligation which they may be called on in court to honour’.<sup>42</sup> Although the traditional doctrine views social rights as unenforceable soft law, this is not a reason to disregard their importance. In the last decades, the international supervisory bodies have adopted valuable ‘case law’ which has shed light on the normative requirements of the social rights.

The right to social assistance can be found in various shapes in the international legal order. Some legal instruments recognise it as an independent right, while others see it as part of the encompassing right to social security.<sup>43</sup> In both cases, it fulfils the same fundamental purpose of assuming an obligation of the state to provide social protection to needy persons who are unable to

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40. Ibid, sec 185.

41. Ibid, sec 177, 181, 184, 208.

42. ECSR (1969), Conclusions I, Statement of Interpretation on Article 13(1) of the ESC, pp. 65-67.

43. Vonk and Olivier (2019), p 220.

take care of themselves in any other way.<sup>44</sup> In 1944, Article 22 Universal Declaration of Human Rights (UDHR) proclaimed that '[e]veryone, as a member of society, has the right to social security and is entitled to realization [...] of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'. This right is supported by Article 25(1) UDHR which guarantees an adequate standard of living for all individuals, including food, clothing, housing, medical care and necessary social services, as well as protection in the event of a social risk such as unemployment. In the 1960s, the right to social assistance was further consolidated in two international human rights frameworks: the European Social Charter (ESC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the wording of Article 9 ICESCR, state parties recognise the right of everyone to social security. According to the Committee of Economic, Social and Cultural Rights (CESCR), this right includes an obligation of states to work towards a non-contributory safety net.<sup>45</sup> Article 13 ESC, on the other hand, recognises an independent right to social assistance which assumes the state obligation to grant adequate assistance to any person who lacks adequate resources. Another international instrument in the area of minimum social protection which should be mentioned here is the 2012 ILO Recommendation on national floors of protection which contains some explicit references to social assistance. Finally, scholars have been discussing the noteworthy possibility of finding a legal basis for the state duty to realise minimum levels of social protection in the European Convention of Human Rights, however, this possibility has thus far proven to be severely limited.<sup>46</sup>

*ii) Normative requirements.* The right to social assistance guarantees individuals without sufficient resources access to adequate levels of public support.<sup>47</sup> Accordingly, the central criterion for eligibility is that of need. The definition of what constitutes adequate resources differs across the different human rights frameworks. Under Article 9 ICESCR, adequate support is defined in abstract terms as the amount and duration of the benefits, whether in cash or in kind, which allow everyone to realise their rights to family protection and assistance.<sup>48</sup> Under Article 13 ESC, the threshold for receiving assistance corresponds to what is necessary to live a decent life and meet basic needs in an adequate manner.<sup>49</sup> While the broad definition of adequate benefits provides states with sufficient discretion to determine the levels of support in accordance with the available resources and national social policy choices, the requirement to guarantee the subsistence minimum has a mandatory character. In its General Comment No. 19 on the right to social security, the CESCR refers to this requirement as the primary core obligation of states under Article 9 ICESCR:

To ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

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44. Idem.

45. Vonk and Olivier (2019), p 223.

46. Koch (2009); Leijten (2017); Leijten (2019).

47. Cf. Vonk and Olivier (2019).

48. CESCR (2007), General Comment No. 19, par 22.

49. ESCR (2006), Conclusions XIII-4, Statement of Interpretation on Article 13(1), pp 54-57.

The wording of this core obligation reflects the broad, quasi-universal personal scope ('all individuals and families')<sup>50</sup> and the narrow material scope of the covered needs. With regard to the latter, the CESCR pursues an absolute definition by enumerating specific basic needs which must be provided for: essential healthcare, basic shelter and housing, water and sanitation, food-stuffs, and basic forms of education.

### *b). Admissibility of sanctions*

*i). General observations.* The mandatory nature of the guaranteed subsistence minimum as a core component of the right to social assistance raises the question of whether governments may tie the provision of benefits assistance to the fulfilment of claimant duties and limit public support as a sanction for non-compliance. The supervisory bodies address this matter using a careful, yet firm, differentiation. According to the CESCR, eligibility criteria are only compatible with Article 9 ICESCR under the condition that they are reasonable, proportionate and transparent.<sup>51</sup> Furthermore, '[t]he withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law'.<sup>52</sup> To the extent where the measures do not affect the guaranteed subsistence minimum, welfare sanctions can be considered compatible with the right to social assistance. Once this threshold is exceeded, however, the CESCR is clear that the imposed sanctions are no longer admissible: 'Under no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits'.<sup>53</sup> The ECSR has addressed this question in similar terms:

The establishment of a link between social assistance and a willingness to seek employment or to receive vocational training is in keeping with the Charter, in so far as such conditions are reasonable and consistent with the aim pursued, that is to say to find a lasting solution to the individual's difficulties. Reducing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person concerned of his/her means of subsistence.<sup>54</sup>

*ii). The effectiveness of welfare sanctions.* The effectiveness of welfare sanctions is not a central topic of the case law of the international supervisory bodies. This can be explained against the background of the wide margin of appreciation which states traditionally enjoy when designing social policy objectives and deciding which means are suitable to achieve them. Nonetheless, the bodies have indirectly touched upon the matter with some general observations. Under Article 13 ESC, the CESCR has reiterated on several occasions in its Conclusions of 2006 and 2013 that benefit conditions must be reasonable and consistent with the objective of finding a long-term solution to the individual's problems.<sup>55</sup> The formulation of this requirement creates the impression that the Committee applies it only in the context of claimant conditions, and not to welfare sanctions. It

50. Cf. Eleveld (2018), p 453.

51. CESCR (2007), General Comment No. 19, par 24.

52. CESCR (2007), General Comment No. 19, par 24.

53. CESCR (2007), General Comment No. 19, par 78.

54. ECSR Conclusions, decision of 06 December 2017, Norway, 2013/def/NOR/13/1/EN.

55. ECSR Conclusions, decision of 30 June 2006, Estonia, 2006/def/EST/13/1/EN; ECSR Conclusions, decision of 30 June 2006, Portugal, 2006/def/PRT/13/1/EN; ECSR Conclusions, decision of 06 December 2017, Andorra, 2013/def/AND/13/1/EN; ECSR Conclusions, decision of 06 December 2017, Norway, 2013/def/NOR/13/1/EN.

might, however, also be the case that the ECSR has been addressing the body of conditions and sanctions as a whole. An indication for this can be found in the 2013 Conclusions on Hungary, where the Committee adopted the following wording: '[...] in so far as such conditions are reasonable and consistent with the aim pursued, that is to say to find a lasting solution to the individual's difficulties, without depriving the person concerned of his/her means of subsistence'.<sup>56</sup> While speaking solely about claimant conditions, the Committee implicitly addressed welfare sanctions in the last part of the consideration. Traces of the question on effectiveness can also be found in the documents adopted by the CESC under Article 9 ICESCR. In its General Comment No. 19, the Committee highlighted the requirement that welfare sanctions must be based on grounds which are reasonable. Although it is not clear what criteria the CESC attaches to the reasonableness requirement, it could be argued that welfare sanctions which do not effectively promote compliance with conditions or do not enhance the reintegration of the individual cannot be considered reasonable.

iii). *Sanction mitigation instruments.* The impact welfare of sanctions on the guaranteed subsistence minimum is a matter which has received a considerable amount of attention by the international supervisory bodies. As discussed above, both the ICESCR and the ECSR draw a red line with regards to benefit reductions which touch upon the guaranteed minimum: 'Under no circumstances'<sup>57</sup> can such measures be brought in conformity with the right to social assistance. The absolute nature of this requirement suggests that Member States could not adopt legislation which limits public support to levels which are lower than the prescribed mandatory minimum, let alone to completely suspend welfare payments. In practice, however, this requirement has proven to have a more flexible nature. The case law of the ECSR under Article 13 ESC shows that the Committee does not examine national welfare sanctions in absolute terms. Accordingly, the mere existence of the possibility of even a full 100% benefit reduction does not automatically render the measure incompatible with the right to social assistance. Instead, the Committee is much more interested in the net effect of the sanctioning system on individuals. If states can demonstrate that sanctioned individuals can access the necessary means to cover their existence minimum in alternative ways, then the national system could still be in conformity with the right to social assistance.<sup>58</sup> One way to do so is by creating the possibility to grant hardship payments to vulnerable individuals who have had their benefits reduced or suspended. The ECSR has inquired as to the existence of such hardship payments in national systems on multiple occasions. In its 2013 and 2017 Conclusions, the Committee asked the government of Portugal to confirm that individuals who have their welfare payments suspended are eligible to receive exceptional short-term benefits of limited amounts which cover the levels of the subsistence minimum.<sup>59</sup> And in the cases of the United Kingdom, Lithuania, and Romania, the ECSR devoted special attention to the availability of hardship clauses which mitigate the effect of the imposed sanctions.<sup>60</sup> A second type of sanction mitigation instrument which the ECSR has started exploring recently is the good reasons clause. In

56. ECSR Conclusions, decision of 06 December 2013, Hungary, 2013/def/HUN/13/1/EN.

57. CESC (2007), General Comment No. 19, par 78.

58. Cf. Eleveld (2018).

59. ECSR Conclusions, decision of 08 December 2017, Portugal, 2017/def/PRT/13/1/EN; cf. Eleveld (2018), p 455.

60. ECSR Conclusions, decision of 08 December 2017, Romania, 2017/def/ROU/13/1/EN; ECSR Conclusions, decision of 08 December 2017, UK, XXI-2/def/GBR/13/1/EN; ECSR Conclusions, decision of 08 December 2017, UK, XXI-2/def/GBR/13/1/EN; cf. Eleveld (2018), p 455.

its 2017 Conclusions on the Czech Republic, the Committee noted that the national legislation in question allows the competent authority to grant assistance to sanctioned individuals on a case-by-case basis, if there are good reasons to do so or when the person would be at risk of serious bodily harm.<sup>61</sup>

#### 4. Comparative analysis

The examination above helps reveal the striking similarities in the approaches of the German and the international legal order to minimum social protection and welfare sanctions. In the first place, the legal frameworks of both systems recognise a right to a guaranteed subsistence minimum which is part of a more encompassing concept of social protection. In Germany, this parent concept is the social state principle which assumes the duty of the legislator to adopt the arrangements necessary for an adequate protection in a social state. While the German Basic Law does not recognise an independent right to social assistance as such, the protection of human dignity in a social state creates an unwritten legal basis for the basic right to a guaranteed subsistence minimum which can be invoked by individuals before courts to challenge shortcomings of the system. In the international dimension, the right to social assistance is recognised by a range of frameworks as an independent human right, or as part of the right to social security. This human right requires states to realise adequate levels of social protection. The state duty to provide individuals in need with the means necessary to realise the subsistence minimum represents a mandatory core obligation within the parent right to social assistance.

In the second place, the scope of protection granted by the right to a guaranteed subsistence minimum is similar in the German and in the international context. The fundamental nature of this right renders it broad and (quasi-)universal in its personal scope, and very limited in its material scope. It guarantees the means necessary for basic goods such as food, shelter, heating, clothing and basic forms of healthcare and education. In Germany, the granted protection extends beyond the physical dimension to also cover a basic level of participation in the social, cultural and political life.

In the third place and most importantly for the purposes of this article, the judicial bodies supervising the respective human rights frameworks have developed a similar approach for reconciling welfare sanctions with the mandatory requirements of minimum social protection. They reserve sufficient margin of appreciation which enables the legislator to make the provision of social assistance dependent on the fulfilment of claimant duties which pursue reintegrative purposes. Furthermore, the legislator is allowed to promote compliance with these duties by adopting a system of negative incentives such as welfare sanctions. At the point, however, that the imposed sanctions interfere with the guaranteed subsistence minimum, the supervisory bodies become increasingly strict in their examination. The effectiveness of welfare sanctions represents the first point of reference which is especially prominent in the German legal context.<sup>62</sup> The German Constitutional Court is prepared to accept severe benefit reductions, however under the condition that the legislator has based these intrusive sanctions on comprehensive empirical research which

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61. ECSR Conclusions, decision of 06 December 2017, Czech Republic, XX-2/def/CZE/13/1/EN.

62. The effectiveness of welfare sanctions is becoming a relevant factor also in other European countries. In Denmark, following a principle decision of the Council of Appeal, municipalities are now required to assess whether a given sanction will promote the recipient's availability with regard to work or education; cf. Eleveld, Harris and Schøler (2020), p. 125.

supports the argument that these are effective measures for promoting compliance with claimant duties and reintegration. The second point of reference for the examination of welfare sanctions is the availability of sanction mitigation instruments. Both in Germany and in the international legal order, the respective judicial bodies do not categorically prohibit states from sanctioning non-compliance with welfare duties using far-reaching benefit reductions. Instead, they examine whether the sanctioning system is sufficiently flexible to protect vulnerable individuals who face deprivation of their subsistence minimum. In practice, such flexibility can be created by adopting sanction mitigation instruments. In Germany, the recent judgment of the BVerfG corrected the unconstitutionality of the sanctioning system by introducing three types of mitigation instruments: a hardship clause, a discretionary clause and a reparation clause. And in the international legal context, the case law of the ECSR has highlighted the importance of hardship clauses and good reason clauses.

In her inspiring research, Eleveld argues that states should implement four types of mitigation instruments in their sanctioning regimes in order to prevent the violation of the right to a minimum means of subsistence: hardship clauses, reparatory clauses, good reasons clauses and discretionary clauses.<sup>63</sup> The 2019 judgment of the German Constitutional Court, which was announced about a year later, is well-aligned with her argument. Eleveld examined the adoption of work-related sanctions and mitigation instruments in 25 European welfare states to reach the alarming finding that there is a reverse relationship between the strictness of the work-related sanction and the number of mitigation clauses. She calls this the ‘sanction mitigation paradox’: ‘[I]n those countries where, from a social rights perspective, mitigation clauses are needed the most, they are hardly or not regulated in social assistance legislation’.<sup>64</sup>

## Conclusion

In the present landscape of the modern welfare state, welfare sanctions and the right to a guaranteed subsistence minimum are experiencing a troubled marriage. Following a long period of uncertainty, recent case law of the national and international judicial bodies has finally shed light on the question of whether the two are at all capable of coexisting: they are. However, their continued marriage is only possible if welfare sanctions respect the inclusive purpose of social assistance and the mandatory character of minimum social protection. The legal developments described in this article exemplify the judicial response to the omnipresent uninterrupted expansion of welfare conditionality which has been taking place in recent decades. Founded on the narrative of the Giddens’s Third Way politics – that the balance between rights and responsibilities of welfare recipients needed to be rethought,<sup>65</sup> activation policies have drifted away towards the extreme of responsibilities. It almost seems as if the adopted measures have completely forgotten about the rights dimension of social assistance. Interventions like the one by the German Constitutional Court tip the scales back into balance by strengthening the rights-based approach to social protection. These judicial interventions are subtle – their aim is not to make social policy, but to soften its sharp edges instead. Accordingly, judicial bodies respect the choice of the legislator to use welfare sanctions as a tool for promoting compliance with supposedly reintegrative claimant

63. Eleveld (2018).

64. *Ibid*, p 470.

65. Giddens (1998).



duties. However, by subjecting more severe measures to a stricter scrutiny of their impact on vulnerable groups of individuals and on the mandatory levels of minimum social protection, these interventions mitigate the negative effects of the adopted policy measures and reconcile them with the root objective of the welfare state: social inclusion and reintegration.


### Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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